6/35

Office - Supreme Court
FILED
SEP 26 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 426

NORTHERN FUR COMPANY, INC. and INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

—against—

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY and RAILWAY EXPRESS AGENCY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN M. AHERNE
Counsel for Petitioners
99 John Street
New York 38, N. Y.

BIGHAM, ENGLAR, JONES & HOUSTON
Of Counsel
99 John Street
New York 38, N. Y.

INDEX

PETITION

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	3
The Statutes Which the Case Involves	3
Statement of the Case	4
Reasons Relied on for the Allowance of the Writ	12

APPENDIX A

Opinion of the United States Court of Appeals for The Seventh Circuit 1a-11a

Memorandum of the United States District Court for The Northern District of Illinois, Eastern Division 11a-13a

Judgment of the United States Court of Appeals for The Seventh Circuit 14a

APPENDIX B

Title 49 U. S. C.:

Section 1 ..... 15a-19a
Section 2 ..... 19a
Section 6 ..... 19a-21a
Section 10 ..... 21a-25a
Section 20(11) 25a-28a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

NORTHERN FUR COMPANY, INC. and INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

—against—

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY and RAILWAY EXPRESS AGENCY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, plaintiffs in the district court, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, which affirmed a judgment of the U. S. District Court for the Northern District of Illinois, Eastern Division.

Opinions Below

The opinion of the Court of Appeals and the memorandum of the District Court are appended hereto (Appendix A, pages 1a and 11a respectively). The District

Court memorandum has not been officially reported. The opinion of the Court of Appeals is reported in 224 F. 2d 181.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit, dated June 29, 1955, was entered the same day.

The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1) on the following grounds:

(1) The Court of Appeals has decided an important question of federal law under the Interstate Commerce Act which has not been, but should be, settled by this court; and in so doing, it expressly adopts and follows the decision of an intermediate state appellate court in the case of *Aetna Ins. Co.* v. *Railway Express Agency, Inc.* (Ohio Appeals), 74 N. E. 2d 425. Consequently the decision below is in effect the decision of a state court deciding a federal question of substance not heretofore determined by this court.

(2) There is a basic conflict between the decision of the district court below and other decisions of the Court of Appeals for the Seventh Circuit on the one hand, and that of the Court of Appeals for the Second Circuit on the other hand, concerning the relationship created by the Express Operations Agreement, which should be settled by this court.

(3) The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this court, and has departed from the accepted and usual course of judicial review so as to call for an exercise of this court's power of supervision.

QUESTIONS PRESENTED FOR REVIEW

1. Where rail express shipments remain in the exclusive custody of Railway Express Agency, Inc., and are merely "hauled" by the railroads, are the railroads "carriers handling" the shipments within clause 1 of the Uniform Express Receipt so as to confer upon them the benefit of a contractual limitation of carrier liability established by the transportation contract between shippers and Railway Express Agency, Inc.?

2. Are interstate railroads (regulated by Part I of the Interstate Commerce Act, 49 U. S. C. Sections 1-26) which haul Railway Express Agency cars and express material under the Standard Express Operations Agreement required to file tariffs with respect to such service by the provisions of Sections 1 and 6 of Title 49 U. S. C. and to obtain released rates authority from the Interstate Commerce Commission under the Carmack Amendment, Section 20(11) of the Interstate Commerce Act in order to limit their liability to an amount less than the "full actual loss"?

3. If Question 2 is answered in the affirmative, is the relationship between the railroads and Railway Express Agency, Inc. such that those statutory obligations are fulfilled where Railway Express Agency, Inc., "for itself and on behalf of" five named Canadian express companies, files tariffs pursuant to Sections 1 and 6 with the Interstate Commerce Commission and obtains from the latter released rates authority pursuant to Section 20(11)?

The Statutes Which the Case Involves

Title 49 U. S. C.: Section 1 (1),(2),(3),(4),(5) and (6); Section 2; Section 6 (1),(4),(7); Section 10; and Section 20(11). The relevant provisions of these statutes appear in Appendix B of this petition.

Statement of the Case

Since 1929, the interstate transportation of express shipments over the nation's railroads has been virtually centered in respondent Railway Express Agency, Inc. (hereinafter called "Railway Express"). Such transportation is conducted pursuant to *two instruments* filed with the Interstate Commerce Commission. The construction and effect of these instruments, and the applicability of Part I of the Interstate Commerce Act, present important federal questions relating to interstate commerce which have not been, but which should be, settled by this court. Respondent Minneapolis, St. Paul & Sault Ste. Marie Railway Company (hereinafter called "Soo" or "Soo Line") relies upon these two instruments to limit its liability for the concededly negligent destruction of an interstate express shipment.

The *first* instrument is the Uniform Express Receipt. The basic receipt form long antedates Railway Express. *Matter of Express Rates, Practices, Accounts and Revenues*, 28 I. C. C. 131. Clause 2 thereof (BX, p. 239)* provides for a limitation of liability in a stated amount in the absence of a higher valuation declared by the shipper. As a consequence, a great majority of express matter delivered for carriage to Railway Express, and hauled by American railroads, moves under such released or limited valuation. Clause 1 of the receipt provides:

> "The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the

---

* Under the Rules of the Court of Appeals below, the documentary exhibits were submitted as a separate bound volume of exhibits with the printed record. The bound volume has been certified, and the contents thereof will be referred to as ("BX, p. —"). Numbers in parentheses, not preceded by "BX" refer to the printed pages of the record.

consignee and all carriers handling this shipment and shall apply to any reconsignment or return thereof." (BX, p. 239)

Although this court has had frequent occasion to consider limitation of liability provisions in so far as they relate to the direct carriers (such as express companies), it has never passed upon clause 1 of the Uniform Express Receipt to determine the third parties to whom such contractual limitation extends. Its extension to railroads, as made in the courts below, means that, for the first time, a Court of Appeals has held that the railroads may limit their liability for negligent destruction of a shipper's goods, without obtaining permission to do so from the Interstate Commerce Commission. The only court, other than those below, to construe clause 1 has been an Ohio intermediate appellate court in *Aetna Ins. Co.* v. *Railway Express, Inc.* (Ohio Appeals), 74 N. E. 2d 425. The reasoning of that court was expressly adopted by the Court of Appeals below, so that in effect, this case also involves federal questions of substance decided by a state court which have not heretofore been determined by this court.

The *second* instrument is the standard Express Operations Agreement. That agreement was conceived as part of a "Report and Plan for Future Conduct of Express Business" (BX, pp. 41-131), formulated by most of the nation's railroads in 1928. The stated object of the Plan was, through the use of that Agreement, to make the railroads "common carriers of express shipments and principals in this respect, operating in the name of their common agent", Railway Express (BX, p. 56; and see BX, p. 44). In furtherance thereof, Railway Express was organized in 1929. It took over the operations of the independent American Railway Express Company and entered into separate Express Operations Agreements

with virtually every railroad in the United States, including respondent Soo Line (R. 36). *Securities and Acquisition of Control of Railway Express Agency, Incorporated,* 150 I. C. C. 423.

The Express Operations Agreement has never been passed upon by this court.* Its importance, as a matter of the federal law of interstate carriers, is self evident. If the railroads have accomplished the stated purpose of their Plan, and made themselves common carriers of express shipments, then manifestly they are subject to Part I of the Interstate Commerce Act in respect of their operations as common carriers *by express,* just as they admittedly are in respect of their general operations as rail carriers. The national transportation policy, as embodied in that Act, requires carriers subject thereto to comply with the statutory provisions in respect to filing tariffs, etc. (Title 49 U. S. C. Sections 1, 6, and 20(11), Appendix B, pp. 15a, 19a, 25a). Any contractual limitation of liability to an amount less than the full actual loss is made void unless released rates and tariffs are filed with, and approved by, the Interstate Commerce Commission, as required by the Carmack Amendment, Title 49 U. S. C. Section 20(11); Appendix B, pp. 25a-28a; *New York, New Haven & Hartford Railroad Co.* v. *Nothnagle,* 346 U. S. 128, 134, 135. Concededly, Soo Line made no such filings with respect to shipments by express (R. 74).

Clearly, therefore, if the status of the railroads envisioned by the Plan has been realized through the Express Operations Agreement, the attempt to limit Soo's liability on express shipments is void because of their failure, including that of Soo, to comply with the Act

* So far as known to counsel it came before this court only once, and that was on a petition for certiorari to the Second Circuit in *Railway Express Agency, Incorporated* v. *Commissioner of Internal Revenue,* 336 U. S. 944, where certiorari was denied.

(unless saved by the agency theory hereinafter referred to—not decided by the Court of Appeals) and the Court of Appeals has committed grave error in deciding a most important point of federal law never decided by this court.

The Court of Appeals held, contrary to respondents' pleadings and to the stated purpose of the Plan, that the railroads are not *common* carriers. They are, said the Court of Appeals, *"carriers"*, but not "common" carriers. They are carriers "not having custody of the articles shipped". Thus, the Court of Appeals was able to conclude that the railroads were not required to file tariffs covering their express operations, but at the same time are "carriers handling" the shipment within the meaning of clause 1 of the Express Receipt. That "saved the day" for the railroads. The court did not explain how an interstate railroad can be *any* kind of a "carrier" with respect to shipments of which it never had *custody*. A "carrier" is merely one kind of bailee—a bailee for purposes of transportation (*Hutchinson, Law of Carriers* [1906], 3d ed., Vol. I, sec. 1). By definition that imports custody.

Apparently the court recognized that its decision placed the railroads in a somewhat anomalous posture, for it said "A railroad is a carrier even though it is not a common carrier", and quoted from *Kansas City Southern Railroad Co.* v. *U. S.*, 228 U. S. 760, in support of that statement (Appendix A, p. 7a). But the *Kansas City Southern* case is flatly contrary to the holding below on the very point for which it is cited. Immediately following the sentence quoted by the Court of Appeals is this statement in the opinion of the *Kansas City Southern* case which completely demolishes the distinction made by the Court of Appeals:

> "But a common carrier dealing with transportation that is subject to the (Interstate Commerce) Act can-

not escape its statutory obligation by calling itself a private carrier as to such transportation." (p. 764).

Transportation by express is specifically made subject to the Act. [49 U. S. C. Section 1 (3)(a)].

Arriving at this extraordinary conclusion, the Court of Appeals found it unnecessary to decide the railroad's primary position which was the basis of the decision of the District Court (R. 94) and to which a large part of the record and briefing was devoted, viz., that the railroads are common carriers of express shipments, and that they did in fact file tariffs with respect to their express operations because (it is claimed) the Express Company was their *agent*, and compliance by the Express Company with the tariff and released rates authority requirements (albeit such acts were expressly stated to be "for itself and on behalf of" five named Canadian railroads [BX, pp. 133, 137, 229]) constituted compliance by the railroads.

Hitherto, the express company, the railroads and the Interstate Commerce Commission have assumed that the Express Operations Agreement was a pooling arrangement between common carriers under Section 5(1) of Title 49 U. S. C. *Securities and Acquisition of Control of Railway Express Agency, Incorporated*, 150 I. C. C. 423; *Express Contract, 1929*, 275 I. C. C. 739; *Express Contract*, 291 I. C. C. 11. Yet, now, under the decision below the railroads are given an ambiguous status, without precedent in case or statute law. They are "neither fish nor fowl" in their express operations, and are not subject to the provisions of the Act in respect thereto.

The facts which give rise to these important federal questions are not in dispute. They are largely stipulated. The petitioners, plaintiffs in the District Court, sought to recover $10,444.50, the agreed value of a shipment of furs, stipulated to have been in the *exclusive* custody of respondent Railway Express, when completely destroyed by

the admitted negligence of respondent Soo Line. Petitioners stipulated below (R. 80) that the liability of respondent Railway Express was effectively limited to $2,000 by a declaration of value in that amount contained in the Uniform Express Receipt issued by the Express Company. The only question litigated was whether the liability of respondent, Soo Line, was similarly limited (R. 80). After a non-jury trial, the District Court limited the recovery against both respondents to $2,000 (R. 94). The petitioners appealed to the Court of Appeals for the Seventh Circuit from that portion of the judgment. The Court of Appeals affirmed (Appendix A, p. 14a).

Most of the facts are incorporated in a stipulation received in evidence as Court Exhibit 1 (R. 70-81). Other facts are adduced from the undisputed documentary evidence and the testimony of a Railway Express official (R. 34-68). Summarizing them, we find that on November 23, 1947, at Karlstad, Minnesota, petitioner Northern Fur Company, Inc. delivered two bundles of furs, having an actual value of $10,444.50 (R. 81), to Railway Express (R. 75) for carriage to itself in New York City. Railway Express accepted the shipment and issued its Uniform Express Receipt (R. 13, 75) for *rail* express transportation to Minneapolis, thence by *air* express to New York City. The receipt contained a declared value of $2,000 on the furs.

When the shipment left Karlstad, it was in the exclusive custody of two Railway Express messengers (R. 77) traveling in a combination baggage, express and coach car hauled by Soo Line train No. 110. Near Vargas, Minnesota, the train collided with another Soo Line train (R. 76, 77). The express car and the furs of petitioner Northern Fur Company, Inc. were completely destroyed by fire (R. 77). It was stipulated that the collision was caused by the negligence of Soo Line (R. 80).

The express car, in addition to the railroad's name, contained the lettering "Railway Express Agency, Inc." (R.

76). It was furnished to the express company by Soo Line under the Express Operations Agreement.

The suit by petitioners in the District Court was in *contract* against Railway Express, and in *tort* against Soo Line. The railroad, as a partial defense, pleaded that it was a common carrier subject to Part I of the Interstate Commerce Act (R. 8), and was entitled to limit its liability to $2,000 under the contractual limitation in the express company's Uniform Express Receipt because: (a) it was a "carrier handling" the shipment within clause 1 of the Express Receipt (R. 10); (b) it was, by virtue of the Express Operations Agreement, the principal of Railway Express, and the latter entered into the contract of carriage in its behalf (R. 8-10); and (c) its agent, Railway Express, had complied with the statutory conditions precedent as required by Part I of the Interstate Commerce Act (R. 10).

The petitioners took the primary position that the railroad was neither a carrier handling the shipment nor the principal of the express company; hence it was not entitled to the benefits of the express receipt. As a secondary position, petitioners contended that if the railroad had a carrier status under either or both the foregoing situations, then it was necessarily a common carrier by express with respect to the shipment and, under the undisputed facts, had failed to comply with the statutory conditions precedent pleaded by it.

The District Court limited the liability of respondent railroad and held that it was a "carrier handling" the shipment within clause 1 of the receipt; that the Express Operations Agreement created the relationship of principal and agent between the railroad and the express company; that the statutory filings as to tariffs and released rates by Railway Express were as agent of the railroad; but that in any event, the railroad was a "non-

operating carrier" by express and was, therefore, not required to file tariffs. It did not attempt to explain the contradictory conclusion that the railroad was both a "carrier handling" the shipment and a "nonoperating carrier".

In affirming, the Court of Appeals found that, according to "historical practice" dating back to the *Express Cases*, 117 U. S. 1, railroads are not *common* carriers of express matter, and hence not required to file tariffs. It then placed the railroads in the anomalous status discussed above, viz., while not *common* carriers, while not even carriers "having custody of the articles shipped", the railroads are nevertheless "carriers handling the shipment", so as to entitle them to the benefit of the limitation of liability clause in the express receipt without compliance with the rate and tariff requirements of the Interstate Commerce Act.

This surprising result is "justified" by the statements that "It would be unfair and contrary to the public policy enunciated by Congress and the Supreme Court to permit this plaintiff to recover $10,444.50 when by its declaration of a value of $2,000 it has enjoyed the benefit of a lower transportation charge * * *" and "Railway Express will pay the judgment" because of its agreement to indemnify Soo (Appendix A, pp. 9a-10a). Those would be fair criticisms if petitioner were claiming $10,444.50 against the Express Company, with which it made the transportation contract, but it is not. This claim is in tort against Soo Line, a stranger to the transportation contract. In effect, the court's reasoning subverts the statutory requirement that the agreement permitting limitation be between shipper and carrier [49 U. S. C. Section 20(11)], and substitutes therefor an agreement between the express company and the railroads to which the shipper is not a party.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I

The writ should be allowed because the effect of the decision below is to exempt the some 605 American railroads from all regulation by the Interstate Commerce Commission in respect of their express operations. If such exemption is to be countenanced, it should not be without the approval of this court.

The implications of the decision below are shocking. The Court of Appeals has held that although the vast system of American railroads participates in the revenue produced by the express transportation service (Appendix A, p. 9a), and although Section 1(3) of the Interstate Commerce Act specifically makes express companies subject to its provisions, the 605 American railroads parties to the Standard Express Operations Agreement (BX, pp. 33-40) are not subject to regulation by the Interstate Commerce Commission in respect of their haulage of express shipments.

If that decision is permitted to stand, it gives the railroads *carte blanche* to revert to the old discriminatory practices and tactics which evoked the enactment of the "Act to Regulate Commerce" of 1887, which became the "Interstate Commerce Act" by the Transportation Act of 1920.

In explanation of its decision, the Court of Appeals said, citing *Kansas City Southern Railway Co.* v. *U. S.*, 282 U. S. 760, 764 (Appendix A, p. 7a), that common carriers subject to the Interstate Commerce Act "may have activities which * * * are not subject to the

provisions of the Act". Thus, the Court of Appeals has held flatly that the express operations of railroads "lie outside the performance of their duties as common carriers".

It logically follows from such a decision that notwithstanding the close and comprehensive regulation of interstate rail carriers intended by the Interstate Commerce Act, there is a vast field of their everyday operations in which they are unregulated. Thus the "haulage charges" for express shipments are beyond reach of the Interstate Commerce Commission; and the railroads are permitted to make unjust and unreasonable charges therefor, without violating the specific injunction of 49 U. S. C. Section 1, paragraph 5. Also, the "special rates and rebates" otherwise prohibited by 49 U. S. C. Section 2 become entirely legal; the railroads, with impunity, may make the "preferences" proscribed in section 3 of the Act. If the decision below stands, it will authorize "false billing" and legalize the many other evil practices condemned by Section 10 of the Act. Manifestly also, the decision below means that railroads, in respect of their haulage of express shipments, are not within the National Transportation Policy enunciated in 54 Stat. 899; Act of September 18, 1940, c. 722, Title I, §1 as follows:

"National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of rea-

> sonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

When the decision below is read against the background of the National Transportation Policy thus enunciated and the provisions of 49 U. S. C. 20(11), the conflict is unmistakable.

For these reasons alone it is respectfully submitted that the Court of Appeals has erroneously decided an important question of federal law which has not been, but should be, settled by this court. Furthermore, in so doing the Court of Appeals expressly adopted as its own, the reasoning of an intermediate state appellate court in the case of *Aetna Insurance Co.* v. *Railway Express Agency, Inc.* (Ohio Appeals), 74 N. E. 2d 425. As a consequence, the decision below is in effect the decision of a state court deciding a federal question of substance not heretofore determined by this court.

II

There is a basic conflict between the decision of the District Court below and other decisions of the Court of Appeals for the Seventh Circuit on the one hand, and that of the Court of Appeals for the Second Circuit on the other hand, concerning the relationship created by the Express Operations Agreement, which should be settled by this court.

The Express Operations Agreement, although couched in the language of agency, was held not to create the relation of principal and agent by the Tax Court of the United States in *Railway Express Agency, Incorporated* v. *Commissioner of Internal Revenue,* 8 T. C. 991, and by the Court of Appeals for the Second Circuit, 169 F. 2d 193, affirming the Tax Court. In that case, as here, Railway Express claimed that the Agreement made it the agent of the railroads. But the Tax Court, after submitting the Agreement to a searching test, provision by provision, rejected such relationship, and stated:

> "All these elements contradict, in our view the idea that the petitioner is in all things a mere agency of the railroads in the express business, and tend to show it to be a contractor with relation to them." (p. 1008).

The Court of Appeals for the Second Circuit not only accepted the conclusion of the Tax Court that the express company was an independent contractor, but went on to cite further reasons therefor (169 F. 2d 193, 196). This court declined to grant certiorari (336 U. S. 944).

The Court of Appeals for the Seventh Circuit, however, has taken an opposite view. In *Bowles* v. *Railway Express*

Agency, Inc., N. D. Ill., 65 F. Supp. 852, the district court, in deciding that the pick up and delivery work done by Railway Express for the railroads on the latters' rail freight shipments was not subject to the Emergency Price Control Act, took the position that the express company was "the agent of the railroads subscribing to the Express Operations Agreement for the conduct of the express transportation business" (p. 854). The Court of Appeals for the Seventh Circuit, in affirming the district judge, expressly stated that it was "in accord with his views" and that it "could not improve on his statement of the facts and his reasons for the conclusion reached", and adopted "the same as our own" (*Bowles* v. *Railway Express Agency, Inc.*, 65 F. Supp. 852, affd. *sub nomine, Fleming* v. *Railway Express Agency, Inc.*, 161 F. 2d 659, 660).

In the District Court below, that court held that the Agreement created the relationship of principal and agent (Conclusion of Law #1; R. 94), and the Court of Appeals left that Conclusion undisturbed by affirming the District Court's decision on other grounds.

In the light of the status and relationship claimed by some 605 of the nation's railroads under the Standard Express Operations Agreement, the conflict in the decisions noted above should be resolved by this court, and accordingly, a writ of certiorari should be issued.

III

The writ should be allowed for the further reason that the Court of Appeals has decided an important question of federal law not heretofore settled by this court in a manner which departs from the usual and accepted course of judicial proceedings, so as to call for an exercise of this court's power of supervision.

In order to arrive at its extraordinary decision, the Court of Appeals was forced to adopt several positions which we believe to be unique in the fields of carrier law and the regulation of interstate commerce; and which, we submit, are so unique as to constitute a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

First, although it was the position of the respondents railroad and express company below, taken in their pleadings (R. 8), that the railroad's status was that of "common carrier"; although the "Report and Plan for Future Conduct of Express Business" provides that in their express operations, the railroads shall be common carriers (BX, pp. 44, 56); and although the railroad claimed below that it was the principal and the express company was its agent (as decided by the district court; Conclusion of Law #1, R. 94), the holding of the Court of Appeals is the precise antithesis of all of these. In the face of these record facts, we believe the accepted and usual course of judicial proceeding required the Court of Appeals to conclude either that the railroad was *not a carrier at all* with respect to the haulage of express shipments, or, if it was a carrier, that it was a *common* carrier and therefore a party to the contract of carriage.

The record is devoid of any substance or basis for impressing upon Soo Line an undefined amorphous character of "carrier not having custody of the articles shipped", entitled to the benefits of the limited liability clauses of the transportation contract, but nevertheless not a *party* to such contract.

Second, there is the Court of Appeals' attempt to justify its decision by the statement that Soo Line is a "carrier not having custody of the articles shipped" (Appendix A, p. 8a). It is elementary that the concept of "bailment" inheres in the concept of "carrier". A carrier of goods, in the common law understanding of that term, is that of a *bailee* having *custody* of the goods for the purposes of transportation. Indeed *custody* is an indispensable ingredient of carrier status, as it is of the status of factors, safe depositories and warehousemen. *Hutchinson, Law of Carriers,* [1906], 3d ed., Vol. I, section 1; *Story on Bailments* [1870], 8th ed., Section 457; *Dobie on Bailments and Carriers* [1914], Section 105, p. 296; 8 *Corpus Juris Secundum, Bailments,* §7, p. 243. The opinion below departs from these elementary concepts. Cf. *Transportation Line* v. *Hope,* 95 U. S. 297, 300; *Stevens* v. *The White City,* 285 U. S. 195, 200; *Bank of Kentucky* v. *Adams Express Company,* 93 U. S. 174, 184.

Third, it was petitioners' *primary* contention below that with respect to the haulage of express cars, the railroad was not a "carrier", common or private, with respect to the shipments therein. The record basis of this contenition was the stipulated fact that the shipment in question was at all times in the *exclusive charge* and *custody* of the express company messengers who rode in the car with the shipment (Finding of Fact #14, R. 93; Court Exhibit 1, par. 20, R. 77). Petitioners' secondary position was that if it were held, notwithstanding the foregoing basic concepts, that the railroads were carriers with re-

spect to express shipments, then they had to be common carriers because of either or both the following situations: (1) the provisions of the contract of carriage, by clause 1 of the express receipt, were made "binding upon" carriers handling the shipment; (2) they were principals of the express company's contracts of carriage under the Express Operations Agreement (assuming, but not conceding, the creation thereby of such status); and that if common carriers under either or both such situations, they were liable for the "full actual loss" of property entrusted to them for transportation unless authorized to enter into agreements of limited liability by virtue of released rates and tariffs filed with and approved by the Interstate Commerce Commission pursuant to 49 U. S. C., Sections 1, 6 and 20 (11). *New York, New Haven & Hartford Railroad Co.* v. *Nothnagle*, 346 U. S. 128, 134, 135.

Faced with these contentions, and with the *stipulated* facts (1) that the shipment was in the exclusive custody of Railway Express, and (2) that the railroad had *not* filed tariffs, it was necessary to invent some legal fiction if the benefit of the contractual limitation of liability was to inure to the railroad—a stranger to the transportation contract. The district court created the fiction of a "non-operating" carrier which, although *non-operating*, was nevertheless "handling the shipment" within the meaning of clause 1 of the express receipt. The Court of Appeals did not wholly accept that characterization. It also gave the railroad the benefit of limited liability, but it did so by calling the railroad a "carrier not having custody of the articles shipped". Its use of *Kansas City Southern Railway Co.* v. *U. S.*, 282 U. S. 760, 764 as authority for its position we have discussed at pages 7-8, *supra*, and need not repeat here. The use of that case to support the creation of this fiction illustrates the conflict between the decision of the Court of Appeals and the applicable decisions of this court; and the departure below from the usual and accepted standards of appellate review.

Nor can the failure to comply with the provisions of the Act be justified (as the court below justified it) by the "historical practice" argument drawn from the *Express Cases,* 117 U. S. 1. It is a startling and unheard of concept, never approved nor sanctioned by this court, that any prior course of nonconformance by carriers subject to the Act can constitute a valid substitute or excuse for compliance with the mandatory requirements of Sections 1 and 6 of the Act relating to filing tariffs, and to Section 20(11) pertaining to released rates authority. Cf. *United States* v. *Union Stock Yard & Transit Company of Chicago,* 226 U. S. 286, 306. Manifestly, the Court of Appeals' holding in this respect would, apart from all of the other reasons set forth in this petition, warrant the issuance of a writ of certiorari.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be issued herein.

JOHN M. AHERNE
Counsel for Petitioners
99 John Street
New York 38, N. Y.

BIGHAM, ENGLAR, JONES & HOUSTON
Of Counsel
99 John Street
New York 38, N. Y.

APPENDIX

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11398. OCTOBER TERM, 1954, APRIL SESSION, 1955.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

NORTHERN FUR COMPANY, INC. and INSURANCE COMPANY OF NORTH AMERICA,
Plaintiffs-Appellants,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY and RAILWAY EXPRESS AGENCY, INC.,
Defendants-Appellees.

June 29, 1955.

Before DUFFY, *Chief Judge,* SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* From a judgment of the district court for $2,000 in favor of plaintiffs and

against both defendants, plaintiffs appeal on the ground that the judgment against the defendant railway company (hereinafter referred to as "Soo") should not have been limited to $2,000, but should have been for $10,444.50.

The facts are undisputed.

On November 23, 1947, at Karlstad, Minnesota, plaintiff Northern Fur Company, Inc. (hereinafter referred to as "plaintiff") delivered two bundles of furs, having an actual value of $10,444.50, to Railway Express Agency (hereinafter sometimes referred to as "Railway Express"), for carriage to itself in New York City, and Railway Express issued its express receipt for *rail* transportation to Minneapolis, thence by *air* express to New York. In that receipt plaintiff caused a value of $2,000 to be declared on the furs.

The shipment, which weighed 105 pounds, was lost as a result of the negligent collision of two Soo trains on November 24, 1947 near Vergas, Minnesota, upon one of which trains the shipment was being carried in space allotted to Railway Express by Soo for express shipments, in a railroad car owned by Soo and jointly used for the transportation of passengers, baggage and express. The express car, in addition to the railroad's name, bore the lettering "Railway Express Agency, Inc." At the time of the loss the shipment was in charge of two men traveling in said car. They were primarily employed by Soo, but acted as express messengers having exclusive charge of the shipment. Railway Express reimbursed Soo for one-half of their salaries.

A uniform express receipt was issued by Railway Express. It calls for combined rail express and air express transportation, and it contains clause 1, which reads:

> "1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the

consignee and all carriers handling this shipment and shall apply to any reconsignment or return thereof."

Clause 2 of the express receipt reads as follows:

"2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value."

The controversy here is between the plaintiffs and Soo. Plaintiffs contend that Soo is liable for the full value of $10,444.50. Soo admits that it is liable for loss caused by its negligence, but contends it is liable for only the declared value, because *inter alia* clause 2 of the uniform express receipt, heretofore quoted, limits the shipper's recovery against Railway Express to $2,000, Soo is a "carrier handling the shipment" within the meaning of clause 1 aforesaid, and hence its liability is similarly limited.

With respect to this defense, plaintiffs say that clause 1 of the receipt was not intended to apply to Soo. This, they say, is because Soo was not a carrier; but, if a carrier, it was not handling the shipment and, if a carrier handling the shipment, clause 2 of the receipt as to Soo is invalid

because not embodied in a tariff filed with the Interstate Commerce Commission.

When the government took over the operation of the railroads in 1918, the director general refused to make contracts with the separate companies for the operation of express business over the railroads subject to his control. As a consequence, on June 22, 1918, American Railway Express Company was incorporated to act as the agent of the director general of railroads in transporting express shipments. *U. S. American Railway Express Company*, 265 U. S. 425, 428. The Transportation act of 1920 empowered the Interstate Commerce Commission to authorize the consolidation of the four express companies (which at that time remained in existence, although not operating) into one express company, and on December 7, 1920, the permanent organization of the American Railway Express Company was approved. *Consolidation of Express Companies*, 59 I. C. C. 459.

American Railway Express Company continued to carry on the express business under individual contracts with the railroad companies until, in 1928, the railroads agreed upon a Plan for the Future Conduct of Express Business and organized the defendant, Railway Express Agency, Inc., which purchased the property of American Railway Express Company used in the conduct of express operations. Since 1938 (when the sole remaining independent express company was dissolved), Railway Express has conducted virtually all the rail express business in the United States. Each of the rail carriers, including Soo, entered into an agreement with Railway Express, standard in form and known as "Express Operations Agreement".

Pursuant to Article II of the Express Operations Agreement, Railway Express was constituted the exclusive agent of the railroads for the conduct and transaction of the express transportation business over the lines of the rail carriers. The provisions of the Express Operations Agree-

ment for the pooling of railroad services and the division among the railroads of express revenues, and the exclusive agency provisions of the same agreement were approved by the Interstate Commerce Commission. *Securities and Acquisition of Control of Railway Express Agency, Incorporated*, 150 I. C. C. 423; *Railway Express Agency, Incorporated, and Certain Railroad Carriers' Application for Authority to Contract for Pooling and Division of Earnings*, 227 I. C. C. 517; *Express Contract*, 1929, 275 I. C. C. 739; *U. S.* v. *Railway Express Agency*, 101 F. Supp. 1008.

The Express Operations Agreement was in effect at all times material in this litigation.[1]

Railway Express is a corporation organized under the laws of Delaware. It operates throughout the forty-eight states and in Alaska, Hawaii, Canada and Cuba. It is authorized by its certificate of incorporation to engage in the express transportation business "as agent or otherwise". It is controlled by its own officers and directors. It is a common carrier by express—rail, air and truck—and also operates as a motor carrier under part 2 of the Interstate Commerce Act.

In its brief Soo says:

> "A railroad never has had to file tariffs covering the transportation of express over its lines pursuant to a contract with an independent express company, whereas a railroad operating its own express business in its own name or through a bureau or division of its own entity, has been required since 1887, when the Interstate Commerce Act became effective, to file tariffs covering express transported over its lines. See *Railway Express Agency, Inc. Determination of*

[1] Section 1 of article XI of the agreement provided:

"The Express Company may arrange with the Rail Company for station and train employees of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company, • • •."

> *Status,* 21 MCC 161, 164, 180, 181, 182. Independent express companies were named as carriers in the Hepburn Amendment to the Interstate Commerce Act effective in 1906 and thereafter such companies were required to file tariffs covering shipments handled in their service over lines of railroads."

Plaintiffs in reply say, in part:

> "As a justification for Soo's failure to file tariffs and obtain a released rate order, defendants urge that no railroad ever had to file tariffs, etc. for the transportation of express matter tendered by an independent express company, although a railroad operating its own express business was required to do so. We accept that statement, and we adopt it as our own. The reason railroads were not required to file such tariffs is because *they were not common carriers* with respect to the independent express companies (*The Express Cases,* 117 U. S. 1, 21; *Bank of Ky.* v. *Adams Express Co.,* 93 U. S. 174, 184)."

These respective assertions indicate that the parties agree that where a shipper deals with an express company, rather than with the railroad upon whose lines the express company operates, according to historical practice[2] the

---

[2] In *Memphis & Little Rock R. R. Co.* v. *Southern Express Co.,* 117 U. S. 1, 29 L. Ed. 791, at 800, commonly known as "The Express Cases", the court said:

> "But it is neither averred in the bills nor shown by the testimony that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined."

railroad over whose line the express company operates has never filed tariffs with the Interstate Commerce Commission as common carriers have traditionally done. It would seem to follow logically that the substitution of Railway Express for the numerous independent express companies existing prior to 1918 has not changed the character of the railroad or its duty in regard to filing tariffs. If universal practice during the time that there were several independent express companies did not require the filing of tariffs by the railroads, we see no reason why the substitution of one express company for several would create such a requirement.

We do not concur with plaintiffs in their statement following the above quoted comment from their reply brief:

> "That is our primary position, taken in Point I of our main brief, viz., that Soo is not a 'carrier' at all, with respect to express shipments."

It is a *non sequitur*. A railroad is a carrier even though it be not a common carrier.

Thus, in *Kansas City Southern Railway Company* v. *United States*, 282 U. S. 760, 764, the court said:

> "There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act. *Santa Fe, Prescott and P. Ry. Co.* v. *Grant Brothers Constr. Co.*, 228 U. S. 177, 188; *Terminal Taxicab Co.* v. *Public Utilities Comm.*, 241 U. S. 252."

Compare *Globe & Rutgers Fire Ins. Co.* v. *Winter Garden Co.*, 9 F. (2d) 227, where it was recognized that, when a group of passengers retained custody of their baggage placed by them in cars furnished by the railroad especially

for them, the railroad was not a common carrier in respect to the baggage. The court, at 229, said:

> "The railroad had nothing to do with transport, except to haul the cars. In legal effect those entitled to travel on Garden Company's passage tickets took their baggage with them, in what for the time being were their own cars; they never handed over the insured property to the care or custody of the Railroad Company. Consequently the Railroad Company was liable for negligence alone; * * *".

In the case at bar Soo admits that it is liable for its negligence, but insists that the extent of a recovery therefor by plaintiffs is limited by the $2,000 value limitation placed in the contract between Railway Express and plaintiff. As a carrier not having custody of the articles shipped, it had a right to the benefit of the limitation fixed in the latter contract. As to such shipment it was not a common carrier and hence it was not required to file tariffs covering this transaction. It appears that Railway Express' tariffs conform to the orders of the Interstate Commerce Commission issued after hearings in which the railroads were parties in interest. The public is adequately protected by the filing of tariffs in the name of Railway Express.

The uniform express receipt was approved by the Interstate Commerce Commission in 1913. *Matter of Express Rates, Practices, Accounts and Revenues,* 28 I. C. C. 131. Clauses 1 and 2 thereof have remained substantially the same since that date.

A railroad which, under the circumstances of this case, is transporting a car in which an express shipment is in the physical custody of employees of an express company, is not only a carrier, but it is a "carrier handling" said shipment, as defined in clause 1 of the receipt.

In holding that Soo handled the shipment in question,

our reasoning is similar to that of the court in *Aetna Ins. Co.* v. *Railway Express Agency* (Ohio Appeals), 74 N. E. 2d 425, where, at 427, that court said:

> "Both shipper and consignee knew that a shipment by express requires that the car into which the shipment is placed must be transported from the point of shipment to the point of delivery over the rails of some railroad, that the car in which the shipment is placed will become part of a train which will be drawn by a locomotive over the rails of a railroad, and that engineers, firement, conductors, brakemen, switchmen, telegraph operators, and many other employees of the railroad will cooperate with the baggage and express men in seeing that such shipment arrives at its destination. To say that only the few employees who are actually physically in direct contact with the packages or items of the shipment handle it is to place a strained construction upon the word 'handling' so narrow in meaning that it cannot be reasonably supposed the parties to the agreement intended such construction."

In the case at bar all carriers handling the shipment participate in the cost of rendering the service and in the revenue in connection therewith. It would be unfair and contrary to the public policy enunciated by Congress and the Supreme Court to permit this plaintiff to recover $10,444.50 when by its declaration of a value of $2,000 it has enjoyed the benefit of a lower transportation charge predicated upon the low declared value. Soo's revenue from the shipment would have been proportionately greater had plaintiff declared the value of $10,444.50. As said by the Supreme Court in *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U. S. 28, 29, "The underlying principle is that the carrier is entitled to base rates upon value and

that its compensation should bear a reasonable relation to the risk and responsibility assumed."

It is significant that Railway Express will pay the judgment, no matter what it may be, in accordance with the provisions of the express operations agreement.[3] There could be no more cogent reason for including in the uniform express receipt a provision that its terms inure to Soo. In the capacity of a carrier handling a shipment the railroad is entitled to the benefit of the provisions of said receipt, including the provision limiting the liability for damages for loss of the shipment.

The provisions in section 1 of article II of the express operations agreement between Soo and Railway Express are not inconsistent with our holding that Soo was not required to file tariffs covering the transaction in question. Said section 1 provides, in part:

> "All classifications, tariffs and other rules or regulations relating to the transportation of express matter required or permitted to be filed with the Interstate Commerce Commission or other public body *may* be filed by the Express Company on its own behalf and/or on behalf of the Rail Company and other carriers with

---

[3] Article VII of said agreement provides, in part:

> "As between the Rail Company and the Express Company, the Express Company shall be liable:
>
> (a) For any and all claims on account of loss of * * * the property of others in its charge carried under the provisions of this agreement;
>
> * * * *
>
> The Express Company shall indemnify and save harmless the Rail Company * * * against all claims, demands, suits, and actions whatsoever, including expense of litigation, that may be begun against any of the same on account of any claim arising or growing out of liability assumed by the Express Company under this Article whether in law or in equity or before any compensation board, tribunal, or court whatsoever."

which the Express Company may enter into agreements similar hereto, and to this end the Rail Company hereby constitutes the Express Company its true and lawful agent for the purpose of filing with the Interstate Commerce Commission and any other proper public body, domestic or foreign, all necessary classifications, tariffs and other rules or regulations relating to the transportation of express matter." (Italics supplied.)

The filing of such tariffs was by this provision left optional with Railway Express.

We find it unnecessary to decide whether plaintiffs are correct in their contention that Railway Express is an independent contractor and not the agent of Soo. Even if plaintiffs are right in so urging, that fact would not conflict with our reasoning and the result which we reach.

For the reasons hereinbefore set forth, we affirm the judgment below.

Memorandum of the United States District Court for the Northern District of Illinois, Eastern Division

In this action, which was tried for the most part on stipulated facts, plaintiff concedes that the liability of the defendant express agency is limited to $2,000.00, the declared value of the shipment involved, in accordance with the provisions of a limitation of liability clause in a standard and duly approved receipt issued by the agency. This Court must determine whether or not the defendant railroad can avail itself of this limitation by virtue of the following provisions in the same receipt:

"The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee

and all carriers handling this shipment and shall apply to reconsignment or return thereof."

Although the plaintiff shipper declared the value of the shipment at $2,000.00, its fair reasonable market value was $10,444.50. The shipper's declaration of the lesser amount resulted in a saving of $9.78 in express charges. The shipment was subsequently destroyed in fire caused by the admitted negligence of the railroad.

This Court has carefully examined and considered the pleadings, evidence and exhaustive briefs of counsel. It is of the view that the liability of the railroad is limited to the declared value of $2,000.00 by virtue of the provisions of the aforementioned clause.

The language of the receipt is clear and simple, and it is difficult to see how the interpretation given to it by the defendants can be avoided. It serves adequately to place any shipper on notice. To hold that this provision did not contemplate the defendant railroad or any other carrier transporting this shipment would involve an unwarranted interpretation of simple language. This Court considers the railroad as a carrier. It accepts the defendant's classification of the railroad, namely, non-operating carrier, as being a realistic and practical description. To consider the railroad which hauls the shipment and controls every phase of its actual transportation as not being the carrier represents an unrealistic view of the entire operation. It also appears to the Court that the contrary argument of the plaintiff in this regard is inconsistent with its pleadings.

The express operations agreement was filed before and approved by the Interstate Commerce Commission and is now a matter of public record. By its provisions the express agency is the agent of the defendant railroad for transportation of express shipments and for the filing of required tariffs. Furthermore, the defendant railroad as

a non-operating carrier is not required to file tariffs. *Woods* v. *N. Y. Cent. Rd. Co.*, 286 ICC 373.

It should also be noted that under the prevailing tariffs at the time of this shipment the shipper ultimately
158 controlled his recovery for possible loss by his declaration of value. In this particular instance, he chose to declare the value at $2,000.00. If the shipper had declared the true value, there would be no problem at the present time. His failure to do so places him in a questionable position at this time. According to our view the Court should move slowly and cautiously in granting relief in this type of situation so as not to encourage such practices.

Defendants will present appropriate findings of fact and conclusions of law and order on December 6, 1954, at 10:00 A. M.

Enter:

J. S. PERRY,
Judge.

November 26, 1954.

Appendix A

Judgment of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, June 29, 1955

Before

Hon. F. RYAN DUFFY, *Chief Judge*

Hon. H. NATHAN SWAIM, *Circuit Judge*

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Appeal from the United States District Court for the Northern District of Illinois Eastern Division

---

NORTHERN FUR COMPANY, INC. and INSURANCE COMPANY OF NORTH AMERICA
Plaintiffs-Appellants

No. 11398 vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY and RAILWAY EXPRESS AGENCY, INC.
Defendants-Appellees

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs.

APPENDIX B

TITLE 49 U. S. C.

§ 1. Regulation in general; car service; alteration of line—Carriers subject to regulation

(1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States.

(c) The transmission of intelligence by wire or wireless from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) *Transportation subject to regulation.* The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) *Definitions.* (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with

any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

(b) For the purposes of sections 5, 12 (1), 20, 304 (a) (7), 310, 320, 904 (b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

(4) ***Duty to furnish transportation and establish through routes; division of joint rates.*** It shall be the

duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) *Just and reasonable charges.* All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * *

(6) *Classification of property for transportation; regulations and practices.* It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills

of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

* * * *

§ 2. Special rates and rebates prohibited

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. * * *

§ 6. Schedules and statements of rates, etc., joint rail and water transportation.—(1) *Schedule of rates, fares, and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates,

fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

* * * *

(4) *Joint tariffs.* The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may

be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

* * * *

(7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * *

§ 10. Violation of regulations by carriers; discrimination; penalties.—(1) *Violation by carrier or officer; penalty.* Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this

chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense: *Provided,* That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

(2) *False billing or classification by carrier; penalty.* Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the

United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

(3) *Obtaining lower rates by false billing, etc., or by false claim; penalty.* Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this chapter, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly, or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the com-

pensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding $5,000 or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided,* That the penalty of imprisonment shall not apply to artificial persons.

(4) *Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee

discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. * * *

* * * *

§ 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading

or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed

upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And*

provided further, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

Office - Supreme Court, U.S.
FILED
OCT 27 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 426

NORTHERN FUR COMPANY, INC. AND INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY AND RAILWAY EXPRESS AGENCY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

R. J. FLETCHER,
Counsel for Respondents,
219 East 42nd Street,
New York 17, New York.

FULMER LONG,
Of Counsel,
612 South Clinton Street,
Chicago 7, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Nomenclature	1
Jurisdiction	2
Questions Presented for Review	3
Statement of the Case	4
Reasons Opposed to the Allowance of the Writ	9
Conclusion	18

Cases Cited.

Adams Express Co. v. Croninger, 226 U. S. 491 18

Aetna Ins. Co. v. Railway Express Agency, Inc., 74 N. E. 2d 425 .....2, 16

Atlantic C. L. R. Co. v. Riverside Mills, 219 U. S. 186 14

Bowles v. Inland Empire Dairy Association, D. C. Wash., 1943, 53 F. Supp. 210 13

Bowles v. Railway Express Agency, Inc., 65 F. S. 852, affirmed by the Seventh Circuit, sub nomine, Fleming v. Railway Express Agency, Inc., 161 F. 2d 659 .....12, 14

Chicago & N. W. Ry. Co. v. Davenport, 205 F. 2d 589 certiorari denied, 346 U. S. 930 10

Express Contract, 1929, 275 I. C. C. 739 .....9, 11

Galveston H. & S. A. R. Co. v. Wallace, 223 U. S. 481 14

Louisville & N. R. Co. v. Mottley, 219 U. S. 467 17

Memphis and Little Rock R. R. Co. v. Southern Express Co. (The Express Cases), 117 U. S. 1 14

Missouri K. & T. R. Co. v. Ward, 244 U. S. 383 18

New York, New Haven and Hartford Railroad Company v. Nothnagle, 346 U. S. 128 16

Railway Express Agency, Incorporated v. Commissioner of Internal Revenue, 169 F. 2d 193 13

Railway Express Agency, Incorporated v. Commissioner of Internal Revenue, 8 T. C. 991 13

Railway Express Agency, Inc., Determination of Status, 21 M. C. C. 161 14

Securities and Acquisition of Control of Railway Express Agency, Incorporated, 150 I. C. C. 423 .....9, 11

Soderberg v. Atlantic Lighterage Corporation, 19 F. 2d 286 certiorari denied, 275 U. S. 542 14

Southeastern Express Co. v. Pastime Amusement Co., 299 U. S. 28 17

Sun Insurance Office v. Be-Mac Transport Co., 132 F. 2d 535 14

Texas & P. Ry. Co. v. Leatherwood, 250 U. S. 478 18

U. S. v. American Railway Express Company, 265 U. S. 425 14

Wood v. N. Y. Cent. Rd. Co., 286 I. C. C. 373 ..7, 11, 15, 16

STATUTES CITED.

Title 49 U. S. C. Sec. 1 3

Title 49 U. S. C. Sec. 5(1), (Interstate Commerce Act)9, 11

Title 49 U. S. C. Sec. 6 3

Title 49 U. S. C. Sec. 6(5), (Interstate Commerce Act) 15

Title 49 U. S. C. Sec. 20(11) 3, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 426.

NORTHERN FUR COMPANY, INC. AND INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY AND RAILWAY EXPRESS AGENCY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Nomenclature.

Reference hereinafter to petitioners shall be as "plaintiffs," to petitioner Northern Fur Company, Inc. as "plaintiff," to respondents as "defendants," to respondent railroad as "Soo," and to respondent express company as "Railway Express."

Jurisdiction.

The case does not in the following respects support the jurisdictional grounds urged by petitioners:

1. Four courts have been called upon to decide the ultimate issue involved in this litigation, and each has reached the same result without a single dissent. The Common Pleas Court of Hamilton County, Ohio and the Court of Appeals of Ohio, Hamilton County, decided the issue in the case of *Aetna Ins. Co.* v. *Railway Express Agency, Inc.*, 74 N. E. 2d 425. The U. S. District Court for the Northern District of Illinois, Eastern Division, and the Seventh Circuit Court of Appeals decided the issue in the instant case, 224 F. 2d 181. The question has not been considered by this Court; however, the decisions below conform to policy enunciated by this Court and Congress. It does not appear to have the importance requiring review at this time. The contention that the appellate decision below is, in effect, the decision of a state court lacks merit.

2. There is no basic conflict between the opinion below and those of other Circuits covering the relationship created by the Express Operations Agreement. The Court of Appeals below expressly declined to pass upon that issue, holding it unnecessary to do so. Nor is there any substantial conflict between the decision of the District Court below and the Court of Appeals of the Second Circuit.

3. The decision of the Court of Appeals is not in conflict with the applicable decisions of this Court but rather is in harmony with this Court's decisions. The Court of Appeals has not departed from the accepted and usual course of judicial review.

Questions Presented for Review.

1. Are railroads, with respect to Railway Express shipments while in the course of transportation over their lines and in their cars, but in the exclusive "charge"* of Railway Express employes riding in the same cars with the shipments, entitled to the benefit of a limitation of amount of liability clause in the transportation contract (Uniform Express Receipt), issued to the shipper by Railway Express, by reason of Clause 1 in said contract, reading:

> "1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee, and all carriers handling this shipment, and shall apply to any reconsignment, or return thereof."?

2. Are railroads transporting Railway Express interstate shipments, pursuant to a standard Express Operations Agreement, required to file tariffs with respect to such transportation by the provisions of Sections 1 and 6 of Title 49 U. S. C. and to obtain released rates authority from the Interstate Commerce Commission under the Carmack Amendment, Section 20(11), Title 49 U. S. C., in order to limit their liability to an amount less than the "full actual loss"?

3. If question 2 is answered in the affirmative, is the relationship between the railroads and Railway Express Agency, Inc. such that those statutory obligations are ful-

* Plaintiffs in their brief (pp. 3, 7, 8, 11, 18, 19) use the word "custody." The fact stipulation (R. 77, Item 20) and Findings of Fact 14 (R. 93) use the word "charge." To the extent that "charge" and "custody" mean "under one's care," they are interchangeable. The shipment was carried in space furnished by Soo in its combination coach, baggage and express car No. 354 (R. 76, Item 17). The operation of Soo train 110 of which said combination car 354 was a part was exclusively under the control of Soo (R. 76, Item 16, R. 77, Item 20). The shipment was in charge of two Railway Express messengers riding in the car with the shipment (R. 77, Item 20).

filled where Railway Express Agency, Inc. files tariffs pursuant to Sections 1 and 6 with the Interstate Commerce Commission and obtains from the latter released rates authority pursuant to Section 20(11)?

Statement of the Case.

This is a suit to recover $10,444.50, the value of an express shipment of two bundles of furs, declared by shipper to be of a value of $2,000.00. The controversy here is the amount of liability. Soo and Railway Express claim liability is limited to the total sum of $2,000.00, the declared value. Plaintiffs admit liability of Railway Express is limited to $2,000.00, but claim that the liability of Soo is $10,444.50, the market value of the shipment (R. 80).

The shipment had been delivered to Railway Express at Karlstad, Minnesota, for carriage to plaintiff at New York City. The only means of transportation available to Railway Express out of Karlstad to and including point of loss was Soo (R. 75, 76). The shipment was totally destroyed in a collision of two Soo trains in one of which the shipment was being carried. It was stipulated that "For the purpose of this litigation, it may be assumed by the court that the loss of the shipment of furs here involved was caused by the negligence of the defendant, Soo Line" (R. 80, Item 26).

At the time of the loss, the shipment was in the charge of two men traveling in the car with the shipment. They were primarily employed by Soo, but acted as express messengers having exclusive "charge" or custody of the shipment. Railway Express reimbursed Soo for one-half of their salaries (R. 76, 77).

The principal railroads of the United States, including

Soo, organized Railway Express as their own express company pursuant to plan formulated in 1928. In accordance with that plan, a uniform contract titled "Express Operations Agreement" was drafted for execution by Railway Express and each railroad over which express shipments were to be carried. Soo executed the Express Operations Agreement, effective March 1, 1929 (Ex. B, Court's Ex. 1, BX 1-40, R. 72, Item 7).

Railway Express distributed its revenues, after the payment of expenses, among the carriers signatory to Express Operations Agreement upon the basis of express business handled by each of said carriers (R. 72).

The express charges depended upon value declared (R. 77, Item 22). Had shipper declared the value of $10,444.50, rather than $2,000.00, Soo's share of express revenue from the shipment would have been proportionately greater (R. 78, Item 24).

Included in the transportation contract (Uniform Express Receipt) issued shipper by Railway Express were the following clauses (Ex. A, R. 13, Court's Ex. 1, R. 75, Item 15, BX 239):

> "1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee, and all carriers handling this shipment, and shall apply to any reconsignment, or return thereof.
>
> "2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for

> any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value."

Plaintiffs alleged in their complaint that Soo "at all times and in the circumstances herein mentioned was a common carrier for hire engaged in interstate commerce." Defendants admitted this allegation (R. 4, 7). However, neither party adhered strictly to this position.

At the trial and on appeal below, plaintiffs urged that Soo was not a carrier at all with respect to the shipment, but if a carrier, Soo was a common carrier, had not filed tariffs in its name, had not obtained a released rate order from the Interstate Commerce Commission under Section 20(11) of the Interstate Commerce Act, and, therefore, the limitation, in any event, as to Soo was unlawful.

Soo claims, and the courts below held, that Soo was one of "all carriers handling this shipment" referred to in Clause 1 of the Uniform Express Receipt and, therefore, that the limitation in Clause 2 inured to Soo's benefit.

Soo urged further that there was no obligation on the part of a contract carrier, or of a non-operating common carrier, to file tariffs or to obtain a released rate order, and that Soo was either of such carriers in relation to the shipment.

Soo urged further that even if there was an obligation on its part to file tariffs and to obtain a released rate order with regard to the shipment, those obligations were met by reason of the fact that tariffs were filed and released rate order obtained by Railway Express and that Com-

pany was Soo's agent under Article II, Sec. 1 of the Express Operations Agreement which provided:

> "The Rail Company hereby constitutes and appoints the Express Company its exclusive agent (a) for the conduct and transaction of the express transportation business, including the off line auxiliary service (commonly known and referred to as pick-up and delivery), upon such passenger, express or mail trains of the Rail Company as may be agreed to, over the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this agreement, owned or leased, and operated by the Rail Company, and (b) for the collection and disbursement and/or division under this agreement of all revenues accruing under this agreement; but nevertheless subject to the conditions and limitations in this agreement contained. All classifications, tariffs and other rules or regulations relating to the transportation of express matter required or permitted to be filed with the Interstate Commerce Commission or other public body may be filed by the Express Company on its own behalf and/or on behalf of the Rail Company and other carriers with which the Express Company may enter into agreements similar hereto, and to this end the Rail Company hereby constitutes the Express Company its true and lawful agent for the purpose of filing with the Interstate Commerce Commission and any other proper public body, domestic or foreign, all necessary classifications, tariffs and other rules or regulations relating to the transportation of express matter."

The trial court below held that Railway Express was the agent of the railroad for the filing of the required tariffs, that the tariffs on file limited recovery to declared value of $2,000.00 as Soo was a carrier handling the shipment, and further that the railroad as a non-operating carrier was not required to file tariffs already filed by the operating common carrier, citing *Wood* v. *N. Y. Cent. Rd. Co.*, 286 I. C. C. 373.

The Appellate Court below held Soo was a carrier handling the shipment and, therefore, entitled to the benefit of the limitation clause, but not a common carrier and, therefore, not required to file tariffs.

REASONS OPPOSED TO THE ALLOWANCE OF THE WRIT.

I.

The Decision Below Does Not Exempt Express Transportation Over Railroads or the American Railroads in Respect of Their Express Transportation from Regulation by the Interstate Commerce Commission.

The public is fully protected with regard to express transportation as it deals exclusively with Railway Express conceded by all parties to be a common carrier under the Interstate Commerce Act (R. 71, Item 3), and, therefore, fully regulated as to rates, released rate orders, and all practices referred to by the plaintiffs at page 13 of their brief.

As between Railway Express and the railroads, including Soo, the provisions of Express Operations Agreement for the pooling and distribution of express revenue and the pooling of traffic and services were approved by the Interstate Commerce Commission in accordance with Section 5(1) of the Interstate Commerce Act, *Securities and Acquisition of Control of Railway Express Agency, Incorporated,* February 11, 1929, 150 I.C.C. 423; *Express Contract, 1929,* 275 I.C.C. 739, decided February 12, 1951.

Section 5(1) of the Interstate Commerce Act provides:

> "Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of

> traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: * * *."

The railroads, including Soo, have not by tariff publication held themselves out as common carriers of express unless it may be said that the publication and filing of tariffs by their agent Railway Express in accordance with Article II, Section 1 of the Express Operations Agreement is a holding out. Compare *Chicago & N. W. Ry. Co.* v. *Davenport*, 205 F. 2d 589, certiorari denied, 346 U. S. 930. It seems clearly to follow that if Soo is a common carrier of express by reason of the publication of tariffs by its agent Railway Express, that company also is agent of the railroads, including Soo, for the purpose of filing tariffs and obtaining released rate orders.

It seems proper to accept the concept of contract carrier relationship between Soo and the railroads on the one hand and Railway Express on the other in line with the circus cases cited at page 595 of 205 F. Supp. in the case of *Chicago & N. W. Ry. Co.* v. *Davenport, supra.* Whether Soo in connection with shipments of express be a contract

carrier, a common carrier, "a carrier not having custody of the article shipped" (Circuit Court of Appeals' opinion, plaintiffs' brief, Appendix p. 8a), or a non-operating carrier (*Wood* v. *N. Y. Cent. Rd. Co.*, 286 I.C.C. 373, 379), the railroads, including Soo, nevertheless under the provisions of the Interstate Commerce Act and in the operation of their business as a whole are common carriers, and having furnished transportation for common carriage held out to the public and operated by Railway Express, the pooling of express services and revenue, necessarily including the exclusive agency provisions of the Express Operations Agreement, is subject to control by the Interstate Commerce Commission under Section 5(1) of the Interstate Commerce Act, *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I.C.C. 423; *Express Contract, 1929*, 275 I.C.C. 739.

II.

There Is No Basic Conflict Between the Decision of the District Court Below and Other Decisions of the Court of Appeals for the Seventh Circuit on the One Hand, and That of the Court of Appeals for the Second Circuit on the Other, Concerning the Relationship Created by the Express Operations Agreement.

The District Court below held:

> "The express operations agreement was filed before and approved by the Interstate Commerce Commission and is now a matter of public record. By its provisions the express agency is the agent of the defendant railroad for transportation of express shipments and for the filing of required tariffs. Furthermore, the defendant railroad as a non-operating carrier is not required to file tariffs. *Wood* v. *N. Y. Cent. Rd. Co.*, 286 I.C.C. 373" (Plaintiffs' brief, Appendix pp. 12a, 13a).

The Appellate Court below held:

> "We find it unnecessary to decide whether plaintiffs are correct in their contention that Railway Express is an independent contractor and not the agent of Soo. Even if plaintiffs are right in so urging, that fact would not conflict with our reasoning and the result which we reach" (Appellants' brief, Appendix p. 11a).

Plaintiffs bring into the picture the case of *Bowles* v. *Railway Express Agency, Inc.*, 65 F. S. 852, affirmed by the Seventh Circuit, *sub nomine, Fleming* v. *Railway Express Agency, Inc.*, 161 F. 2d 659. In that case, the Office of Price Administration sought to charge Railway Express with treble damages for violation of the Price Control Act of 1942 because of alleged overcharges on the sale of defendant's services to the operating railroad companies. The District Court in dismissing the case said at page 854 of 65 F. S.:

> "It is the opinion of the court that the defendant, the agent of the railroads subscribing to the Express Operations Agreement for the conduct of the express transportation business and for the collection and distribution of revenues accruing therefrom (Article II, Sec. 1 of the Agreement) is likewise the agent of the carriers in the performance of the miscellaneous transportation services pertinent to this case. The defendant has a paid-in capital of $100,000. It has neither a paid-in nor an undistributed surplus. Yet it did a gross business for the year ending on December 31, 1943 of over $350,000,000. The capitalization thus is purely nominal. The defendant does not stand on its own feet as a financially independent corporation, but draws its strength from the fact of its being the exclusive agent of the subscribing railroads in the express transportation business. Its revenues, after items of expense are deducted, are distributed to the subscribing railroads in proportion to their share of

> the total express business carried on their lines. The Agency is thus a kind of cooperative, although its membership is not the sort contemplated by the Rochdale pioneers. The relationship between a cooperative and its members is generally regarded as one of agency. *Bowles* v. *Inland Empire Dairy Association*, D. C. Wash., 1943, 53 F. Supp. 210, and cases cited therein."

The Circuit Court of Appeals adopted this opinion as its own.

Plaintiffs argue that the finding of a relationship of agency between the railroads and Railway Express in the case just quoted from is in conflict with the Second Circuit Court of Appeals by reason of the affirmance by that Court in *Railway Express Agency, Incorporated* v. *Commissioner of Internal Revenue*, 169 F. 2d 193, of the decision of the Tax Court in *Railway Express Agency, Incorporated* v. *Commissioner of Internal Revenue*, 8 T. C. 991, wherein the Tax Court in its opinion said:

> "All these elements contradict, in our view the idea that the petitioner is in all things a mere agency of the railroads in the express business, and tend to show it to be a contractor with relation to them." (p. 1008).

In the first place, the Second Circuit Court of Appeals did not adopt the quoted language from the Tax Court and did not hold that Railway Express was not an agent for the purpose of filing tariffs or for the purpose of transacting the railroads' express business.

There is a vast difference between a holding in a tax case that Railway Express was not a "mere agency" and a holding that Railway Express was an agent for the specific purpose of compliance by a railroad with the tariff filing and released rate provisions of the Interstate Commerce Act.

As Judge Campbell in the case of *Bowles* v. *Railway Express Agency, Inc.*, 65 F. S. 852 (*supra*) at page 855 said:

> "The liability of the defendant as a separate, corporate entity for taxes or torts is immaterial in considering whether a specific statute or regulation applies to it."

Many corporations are independent and at the same time act as agent for other independent corporations for a specific purpose. *Galveston H. & S. A. R. Co.* v. *Wallace*, 223 U. S. 481; *Atlantic C. L. R. Co.* v. *Riverside Mills*, 219 U. S. 186; *Soderberg* v. *Atlantic Lighterage Corporation*, 19 F. 2d 286, certiorari denied, 275 U. S. 542; *Sun Insurance Office* v. *Be-Mac Transport Co.*, 132 Fed. 2d 535 at 537.

III.

The Decision Below Conforms to Policy Enunciated by This Court and by the Congress.

Express companies such as Railway Express historically and by definition use the transportation facilities of other carriers for the transportation of shipments they engage to haul on behalf of the public, *Railway Express Agency, Inc., Determination of Status*, 21 M.C.C. 161; *U. S.* v. *American Railway Express Company*, 265 U. S. 425; *Memphis and Little Rock R. R. Co.* v. *Southern Express Co.* (commonly known as *"The Express Cases"*), 117 U. S. 1.

The common carrier service contracted for by a shipper on the basis of the Uniform Express Receipt issued by Railway Express includes the services of the underlying carriers such as Soo and other railroads parties to the Express Operations Agreement over whose lines the shipment is carried or is to be carried. The Express Opera-

tions Agreement is a public document, the same having been filed with the Interstate Commerce Commission in accordance with Section 6(5) of Part I of the Interstate Commerce Act.

At page 19 of their brief, plaintiffs urge that in order to afford the railroad the benefit of the limitation clause in the Uniform Express Receipt, it was necessary to invent "some legal fiction" for Soo, and plaintiffs state "The District Court created the fiction of a 'non-operating' carrier." The term "non-operating common carrier" was used by the Interstate Commerce Commission in the case of *Wood* v. *New York Central R. Co.*, 286 I. C. C. 373, 379, decided December 7, 1952, and cited in the memorandum opinion of the trial court in support of the conclusion that there was no obligation on the part of Soo as a non-operating carrier of express to file tariffs when tariffs offering the service to the public were filed by the operating carrier, Railway Express.

It is respectfully submitted that the term "operating common carrier" as applied to Railway Express, and the term "non-operating common carrier" as applied to Soo and other underlying carriers parties to the Express Operations Agreement are used properly to distinguish between Railway Express as the carrier operating the business or holding the service out to the public through tariff publication and Soo as the underlying carrier whose facilities are used for transportation but which is not holding out to the public as the carrier with which the business is to be transacted.

No additional protection would be afforded the public and no purpose of any value would be served by requiring the underlying carriers to file tariffs in addition to those already filed by Railway Express. A requirement that the underlying carriers file tariffs would only add to the cost of express transportation which the public ultimately must

pay. The same logic applies to released rate orders. Railway Express having obtained released rate orders from the Interstate Commerce Commission, that body has had an opportunity of examining the matter and of furnishing any protection necessary for the public in connection therewith.

The Interstate Commerce Commission in the case of *Wood* v. *New York Central R. Co.*, 286 I. C. C. 373, held that the Interstate Commerce Act did not contemplate the filing of tariffs by non-operating carriers. It is respectfully submitted that on the basis of the Commission's analysis of the tariff filing provisions of the Act at page 379 of 286 I. C. C., it is clear Congress did not intend that underlying non-operating carriers of express such as Soo file tariffs or obtain released rate orders with respect to express transportation.

Certainly, Soo must be considered some kind of carrier with respect to express transportation. Webster defines the term "carrier" as "one who or that which carries or conveys * * * one (whether a single person, a group of persons or a corporation) employed in or engaged in the business of carrying goods for others for hire * * *."

The reasoning of the court in *Aetna Ins. Co.* v. *Railway Express Agency, Inc.*, 74 N. E. 2d 425 at 427, quoted and adopted by the Circuit Court of Appeals (plaintiffs' brief, Appendix p. 9a), makes clear that Soo was handling the shipment.

The case of *New York, New Haven and Hartford Railroad Company* v. *Nothnagle*, 346 U. S. 128, cited by plaintiffs at page 19 of their brief, differs materially from the case at bar. That case turned upon the fact "There was no 'value declared in writing by the shipper or agreed upon in writing'; in fact, not even a baggage check reciting a limitation provision changed hands," and the further

fact that plaintiff had no reasonable opportunity of discovering the limitation and of declaring a higher value (pp. 135, 136).

In the case at bar, plaintiffs knew of the limitation provision and took advantage of the opportunity afforded to declare a higher value. Had shipper declared no value at all, liability would have been limited to $52.50 or 50¢ per pound pursuant to Clause 2 of the Uniform Express Receipt. Shipper, however, declared a value of $2,000.00 at the consequent higher transportation charge. Shipper could have declared the value of $10,444.50 and thereby obligated the plaintiff to pay a transportation charge higher than the charge attached to the declared value of $2,000.00.

As held by the trial judge, Clause 1 of the Uniform Express Receipt adequately brings to the shipper's attention that the limitation clause and other clauses in the receipt inure to the benefit of the underlying carriers, including Soo.

Soo's share of the revenue from the shipment involved was dependent on declared value. Its share would have been proportionately greater had plaintiff declared a value of $10,444.50 (R. 78, Item 24).

The broad purpose of the Interstate Commerce Act was to close the door to or "cut up by the roots" every form of discrimination, favoritism or inequality. *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478.

It would be an unjust discrimination against the shipper who declares the full value and pays the full express charges thereon as well as against the carriers to permit the shipper who declares a lesser value and pays a lesser express charge to recover the full value in case of loss.

As said in *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U. S. 28, 29, "The underlying principle is

that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed."

The limitation clause in the original transportation document covering the entire movement of the shipment binds and protects the participating carriers. *Missouri K. & T. R. Co.* v. *Ward,* 244 U. S. 383; *Texas & P. Ry. Co.* v. *Leatherwood,* 250 U. S. 478.

The organization of Railway Express by the railroads, the execution by them, including Soo, of the Express Operations Agreement in which Railway Express is named agent of the railroads to *operate* the express transportation business over their lines, and Clause 1 of the Uniform Express Receipt together implement the purpose of Congress expressed in the Carmack Amendment to the Interstate Commerce Act, Section 20(11), Title 49 U. S. C., that purpose being to create in the initial carrier unity of responsibility for the transportation to destination, and to make uniform the law applying to interstate shipment claims thereby removing the confusion and uncertainty which previously existed. *Missouri, K. & T. R. Co.* v. *Ward,* 244 U. S. 383; *Texas & P. Ry. Co.* v. *Leatherwood,* 250 U. S. 478; *Adams Express Co.* v. *Croninger,* 226 U. S. 491.

Conclusion.

The petition for writ of certiorari should be denied.

R. J. Fletcher,
Counsel for Respondents,
219 East 42nd Street,
New York 17, New York.

Fullmer Long,
Of Counsel,
612 South Clinton Street,
Chicago 7, Illinois.